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No. 07-513

IN THE
Supreme Court of the United States

BENNIE DEAN HERRING,
Petitioner,

v.

UNITED STATES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

For almost a century, this Court has adhered to a clear, bright-line exclusionary rule in federal criminal prosecutions: courts must suppress evidence offered in the prosecution's case in chief which has been obtained directly through law enforcement wrongdoing that violates a defendant's Fourth Amendment rights. And contrary to the Government's suggestion that the exclusionary rule works with respect only to deliberate or systematic police misconduct, the classic examples of its application involve errors by individual officers: for example, when courts suppress the fruits of unwarranted *Terry* stops or arrests for which probable cause was lacking. This Court has repeatedly recognized that the exclusionary rule will reduce the overall number of such mistakes and thus deter – that is, prevent – constitutional violations.

Applying this rule to petitioner's case is straightforward. Petitioner was arrested in violation of the Fourth Amendment; the police had neither a valid arrest warrant nor probable cause to believe he had committed a crime. Incident to that unconstitutional arrest, the police conducted the search that produced the evidence at issue in this case. The sole reason the police conducted the unconstitutional arrest and search was because the Dale County Sheriff's Department, despite having received clear notice to the contrary, inaccurately reported the existence of a warrant.

Until now, when this Court has declined to require suppression, it has done so by identifying "categorical exception[s] to the exclusionary rule."

Arizona v. Evans, 514 U.S. 1, 16 (1995). For example, the rule does not apply in civil proceedings, *United States v. Janis*, 428 U.S. 433 (1976), or to cases in which the judiciary (rather than the police) was at fault, *United States v. Leon*, 468 U.S. 897 (1984); *Massachusetts v. Sheppard*, 468 U.S. 981 (1984); *Evans*, *supra*, or to violations of the knock-and-announce rule, *Hudson v. Michigan*, 547 U.S. 586 (2006).

The Government does not argue that any categorical principle would permit introduction of the evidence obtained in this case. Rather, it proposes to revolutionize the exclusionary rule by turning it into a case-by-case balancing test under which the application of the rule to unconstitutional searches caused by negligent police recordkeeping would vary from department to department and even from officer to officer. Worse yet, the Government fails to advance even a coherent balancing argument. Although the Government recognizes that "the appropriate perspective from which to consider the deterrent effects of excluding evidence based on police department negligence is *ex ante*, not *ex post*," U.S. Br. 25 (quoting Pet. Br. 44), it ignores that principle, spending much of its time arguing instead that the individual arresting officers in this case could not have been deterred from arresting and searching petitioner once the negligent recordkeeping occurred. That observation is true, but beside the point. Petitioner has never argued that suppression is required here to change the incentives of individual *arresting officers* who rely on flawed police records. Rather, he has consistently argued that suppression provides an important

incentive for police *departments* to maintain accurate records in the first place.

To the extent that the Government even addresses that critical question, its arguments reflect a profound misunderstanding of both the incentives facing police departments and the potential for deterring police negligence. By making clear that courts will refuse to admit evidence discovered as a direct result of unreasonable failures to maintain accurate records, the exclusionary rule will induce police departments to take an appropriate level of care to ensure accuracy. And the Government's suggestion that either civil liability or internal discipline can substitute for suppression fails to recognize that the category of cases in which such remedies are most likely to work are cases in which, under its own approach, suppression would be appropriate as well. By contrast, in cases of police negligence, limitations on the availability of relief under 42 U.S.C. § 1983 and other remedial regimes make suppression an essential element of any successful system of deterrence.

In light of the Government's failure to offer a clear, workable alternative, this Court should reaffirm its time-honored position that police cannot take advantage of their own failure to act reasonably and that evidence seized as a direct result of unconstitutional searches that are the product solely of improper law enforcement activity must be suppressed.

I. SUPPRESSING EVIDENCE OBTAINED AS A DIRECT RESULT OF NEGLIGENT POLICE RECORDKEEPING WILL DETER FOURTH AMENDMENT VIOLATIONS.

The Government does not argue for a categorical exemption from the exclusionary rule for Fourth Amendment violations caused by negligent failures in police recordkeeping. In fact, the Government concedes that suppression may be appropriate in some cases of recordkeeping error. *See, e.g.*, U.S. Br. 18 n.5 (suppression may be appropriate when there are "systemic problems in a recordkeeping system"); *id.* at 24 (suppression may be appropriate when "regula[r]" errors occur). But the Government argues that the exclusionary rule should not apply *in this particular case* because of the specific facts and circumstances involved.

The Government is wrong for two reasons. First, the exclusionary rule depends categorically on the type of error involved, and police negligence properly triggers suppression. Second, even if this Court were to transform the exclusionary rule into a case-by-case balancing doctrine, the balance here would require suppression.

A. Evidence That Law Enforcement Obtains In Violation Of The Fourth Amendment As A Result Of Its Own Recordkeeping Errors Is Categorically Subject To Suppression.

1. The Government suggests that courts hearing suppression motions should engage in a case-by-case inquiry into the subjective awareness of arresting

officers with respect to the lack of an active warrant and into whether objectively unreasonable record maintenance before them is part of a larger pattern within a particular department. That suggestion has no precedent in this Court's decisions, and the Government has provided no reason to embrace a new approach here.

The exclusionary rule demands categorical treatment of police negligence rather than a totality-of-the-circumstances "exclusionary standard" because the rule is designed to alter the incentives facing law enforcement agencies and not merely to influence the future behavior of individual officers who have already committed a particular violation. The exclusionary rule "safeguard[s] against future violations of Fourth Amendment rights through the rule's *general* deterrent effect." *Evans*, 514 U.S. at 10 (emphasis added). "By refusing to admit evidence gained as a result of [unconstitutional] conduct, the courts hope to instill," both in "particular investigating officers" *and* "in their future counterparts, a greater degree of care toward the rights of an accused." *Michigan v. Tucker*, 417 U.S. 433, 447 (1974); *see also Leon*, 468 U.S. at 918 (noting that the deterrent effect of the exclusionary rule can alter either "the behavior of individual law enforcement officers or the policies of their departments").

In light of these goals, application of the rule cannot turn on department-specific facts that have nothing to do with whether a constitutional violation occurred. But that is the import of the Government's suggestion – a suggestion that would impose huge

and unnecessary burdens on the judicial system. First, the Government would require courts to determine not just whether the arrest before them violated the Constitution and was attributable to police negligence – a straightforward inquiry as the proceedings in this case illustrate – but also then to calculate the overall error rate within a police department's records. That latter assessment would require extensive discovery and factfinding even when the negligence appears to be "isolated." U.S. Br. 9.[1] Mistakes in recordkeeping are by definition likely to be exposed only when they lead to an unlawful arrest and incriminating evidence. If, as was true in this case, inaccurate files go months without being noticed or acted upon, the number of constitutional violations caused by recordkeeping errors will necessarily understate a department's actual error rate.

Having determined the error rate – itself a complex undertaking – courts faced with suppression motions would then have to address the question whether this error rate is unreasonable. That

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[1] The Government acknowledges that repeated recordkeeping errors could warrant suppression, but then perversely suggests that because "building a record of systemic problems may be difficult in a single criminal case, . . . such issues would be better addressed through a civil action." U.S. Br. 18 n.5. It is unclear whether once a plaintiff has won a civil action against a particular department, the Government would concede that suppression should follow in all subsequent criminal prosecutions involving searches by that department's officers that are based on recordkeeping errors. The Government's failure to trace out the implications of its position illustrates why this Court has never required such a showing with respect to any class of unconstitutional searches.

inquiry cannot be conducted in a vacuum. It presumably would require examining the record-keeping practices and error rates of departments other than the one responsible for the challenged search.[2]

Having done all that, courts would then have to inquire into the subjective state of mind of individual officers to determine whether those officers were aware of, or should have been aware of, the error rate. But this Court has already squarely rejected the idea of a subjective good-faith exception to the exclusionary rule. *Leon*, 468 U.S. at 915 n.13. An individual officer's subjective beliefs provide no basis for avoiding exclusion when the officer's actions rest directly on unreasonable conduct of other members of the law enforcement team. *Id.* at 923 n.24.

Finally, the court would presumably have to decide whether awareness of the department-specific error rate should have deterred the officers from conducting this particular arrest and search.

This novel multi-factor inquiry bears virtually no resemblance to the one this Court has traditionally conducted, which asks simply whether suppression could meaningfully deter a particular form of police conduct that causes constitutional violations. The admissibility of evidence under the Government's approach would come to depend not on the nature of the constitutional violation – as has been the case up until now – but on a series of department-by-

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[2] The Government's brief is entirely silent with respect to the overall level of recordkeeping error courts ought to countenance.

department or even officer-by-officer determinations made by individual judges hearing suppression motions.[3] This would undercut the functioning of the exclusionary rule, which would no longer provide useful guidance to police departments as to the evidentiary consequences of particular practices.

In short, the Government has proposed an unprecedented and unworkable approach to deciding the admissibility of evidence obtained solely as a direct result of law enforcement personnel's own negligence. By contrast, petitioner offers a clear, easily administrable rule consistent with this Court's longstanding approach: evidence obtained as a result of an unlawful, warrantless arrest that would not have occurred but for culpable conduct within the law enforcement team should be suppressed to ensure that law enforcement will not benefit from its own unreasonable conduct.

2. Contrary to the Government's persistent theme, none of these methodological principles vary when law enforcement has negligently, as opposed to purposefully, violated the Fourth Amendment. As it does with respect to other forms of "police illegality," *Leon*, 468 U.S. at 921, applying the exclusionary rule to negligence in recordkeeping creates a powerful and appropriate incentive for law enforcement

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[3] In addition, if suppression is appropriate only when it is necessary to influence the future behavior of the specific police personnel responsible for the violation, as the Government suggests, then presumably a police department's decision to fire those individuals could preclude suppression even in cases of deliberate misconduct since there would be no future misconduct to deter. This cannot be the correct result.

agencies and personnel to avoid conduct that results in unconstitutional arrests and searches.

The reliability of a department's records will depend to a substantial degree on the resources a department devotes to recordkeeping. A department that implements detailed recordkeeping protocols and conducts frequent audits and cross-checks is more likely to have an up-to-date list of active warrants than one where a clerk jots down "handwritten [notes] on file cards kept in a steel box." U.S. Br. 10. The Government's own brief illustrates this point by discussing recent steps undertaken by the federal government with respect to the FBI's Wanted Persons File "that are expressly designed to prevent the sort of mistaken arrest that occurred here," U.S. Br. 47, and that apparently have cut the federal error rate in half over the past twenty years, *compare* Pet. Br. 36 n.13 *with* U.S. Br. 50.

But recordkeeping, like everything else a police department does, costs time and money. So sufficient incentives must exist for a department to devote resources to keeping its records up-to-date rather than spending that time and money on other functions.

Here, the exclusionary rule plays a critical role. If evidence can be used in criminal cases only if the police records on which arresting officers have relied are accurate, departments will invest more to ensure the accuracy of those records than they otherwise would. This is particularly true given the common dynamic in how warrants records are used by police on the street. Police departments are not engaged in a continuous effort to locate and arrest every person

whose name appears on a department's warrants list, particularly when the offense for which a warrant was issued is relatively minor. *See* Randall Guynes & Russell Wolff, Un-served Arrest Warrants: An Exploratory Study (2004), *available at* http://www.ilj.org/publications/finalwarrantsreport.pdf (last visited Aug. 20, 2008). Rather, officers check the warrants list when they encounter an individual for some other reason and then decide to conduct some kind of inquiry or investigation. In *Evans*, for example, a police officer stopped Evans for driving the wrong way down a one-way street and only then checked his patrol car computer. In this case, Investigator Anderson discovered that petitioner, with whom he had a contentious relationship, was in the police impoundment lot, J.A. 17, and only then asked the department warrants clerk to check whether there was an outstanding arrest warrant.[4]

Contrary to the Government's unsupported speculations, *see* U.S. Br. 9, 25, the inaccurate presence of an individual's name on a police department's warrants list imposes no real costs on the department. The indication is likely to lie dormant unless some further incident prompts an inquiry. Departments therefore face no strong internal incentive to update warrants lists frequently. By contrast, if departments understand that the evidence they obtain from arresting and searching individuals on the basis of a reported

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[4] In the preceding five months, the Dale County Department apparently made no effort to serve the warrant, despite the fact that petitioner could have been easy to locate. *See* Pet. Br. 4.

warrant cannot be used if the warrant no longer exists, this creates a powerful countervailing incentive to keep lists up to date in order to avoid wasting time and effort on unusable arrests and searches.

This general dynamic is illustrated by the facts of this case. The Dale County Sheriff's Department initially failed to accurately update its records to reflect that the warrant had been recalled. It then compounded this "at the very least negligent" recordkeeping "breakdown" Pet. App. 8a (quoting *Tucker*, 417 U.S. at 447); J.A. 60,[5] because for at least five months, it conducted no sort of recordkeeping audit or file maintenance that could have corrected its initial dereliction. Far from this "substantial delay" between the initial negligent act and petitioner's arrest somehow minimizing police culpability, *see* U.S. Br. 39, the delay shows that the department's culpability was hardly "brief in duration," *id.* at 35.

3. More fundamentally, the Government's argument ignores how the exclusionary rule actually works to deter negligent police illegality. The Government acknowledges that the prospect of future adverse consequences "will provide incentives for regulated actors" – such as police departments –

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[5] Although the Government seeks to paint the failure to maintain accurate records here as an "honest mistake[]," U.S. Br. 35, the finding that personnel within the Dale County Sheriff's Department were "at the very least negligent," Pet. App. 8a, distinguishes what occurred here from objectively reasonable conduct that nevertheless produces an inaccuracy. Thus, this case does not present the question whether nonnegligent inaccuracies in police records require suppression.

"to take the appropriate level of care." U.S. Br. 21 (quoting Pet. Br. 43). But it then veers immediately into discussing an only tangentially related point – namely, that law seeks to deter not only negligent, but also reckless or deliberate, conduct. That the sanctions for deliberate or reckless conduct are often more punitive than the sanctions imposed for simple negligence, *see* U.S. Br. 21-22, is irrelevant to the question whether the exclusionary rule should be applied in cases of police negligence. Exclusion of evidence is a narrowly tailored sanction precisely calibrated to police illegality: it simply returns the government to the position it would have occupied had no constitutional violation occurred. *See, e.g., Silverthorne Lumber Co. v. United States,* 251 U.S. 385, 391 (1920) (Holmes, J.) (exclusionary rule removes the "advantages" that the Government gained "by doing the forbidden act"). It does not punish the government at all; it only removes an incentive for unconstitutional behavior.

Indeed, the Government fails to acknowledge that *most* applications of the exclusionary rule involve conduct that can best be characterized as negligent – that is, objectively unreasonable in light of the circumstances involved – rather than purposeful. Consider the classic situations in which the exclusionary rule applies: an officer conducts a *Terry* stop and discovers contraband but the court hearing the suppression motion later finds that the officer lacked reasonable suspicion, *see, e.g.*, *Florida v. J.L.*, 529 U.S. 266 (2000), or an officer makes a warrantless arrest and finds incriminating evidence during a search incident to the arrest but the court hearing the subsequent suppression motion

concludes he lacked probable cause, *see, e.g., Sibron v. New York*, 392 U.S. 40, 62-63 (1968). Both situations will overwhelmingly involve actions undertaken by individual officers who acted in subjective good faith: they *thought* there was reasonable suspicion or probable cause although it turns out they were wrong. At most, the arresting officers have been negligent.[6] But this Court has never even hinted that the fruits of an unconstitutional *Terry* stop or an unconstitutional warrantless arrest can be admitted because this is the first time the officer (or the entire department) has ever been mistaken about the existence of reasonable suspicion or probable cause or because the officer's or department's judgments are usually "reliable." *See* U.S. Br. 20. Neither subjective good faith nor the absence of a proven pattern of negligence can justify admitting evidence discovered solely as a direct result of objectively unreasonable police conduct.

Moreover, the Government's discussion of deterrence in substantive criminal law, see U.S. Br. 21-22, actually ignores the most salient analogy: federal regulatory offenses for which no conscious awareness of wrongdoing is required. In upholding convictions under public welfare statutes that omitted any scienter requirement, this Court has noted that when an individual's "mere negligence"

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[6] The test for whether there is a Fourth Amendment violation in the first place already provides the appropriate degree of leeway by permitting even mistaken stops or arrests as long as the officer's suspicions were objectively "reasonable" or there was "probable" cause to believe the defendant had committed an offense.

may pose a threat to others, "punish[ing] the negligent person though he be ignorant" of his crime will "stimulate proper care." *United States v. Balint*, 258 U.S. 250, 252-53 (1922); see also *United States v. Dotterweich*, 320 U.S. 277, 280-81 (1943) (concluding that the Federal Food, Drug, and Cosmetic Act "serve[s] as effective means of regulat[ing]" potentially harmful substances even though it "dispenses with the conventional requirement for criminal conduct – awareness of some wrongdoing"). So, too, with respect to bureaucratic negligence that violates individuals' Fourth Amendment rights. Eliminating the benefits that might otherwise accrue from negligent behavior will prevent constitutional violations by inducing departments to change their policies or supervise their employees more closely.

In any event, the Government misunderstands what deterrence means. It suggests that there is no need to apply the exclusionary rule to discrete examples of negligence[7] because "[n]o sanction . . . can deter every possible error." U.S. Br. 35. This argument stands deterrence theory on its head. No

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[7] It is, in fact, impossible to know whether the recordkeeping error in this case "was an isolated mistake." U.S. Br. 19. To be sure, the warrants clerk asserted at a second evidentiary hearing that her records were "reliable," Pet. App. 15a, after initially testifying that "several times" there had been communications problems. *See id.* at 14a-15a. But there is no evidence that the Dale County Department has ever conducted any systematic study of its records that could support this claimed reliability. Given the error rates discovered in the variety of audits mentioned by petitioner, his *amici*, and the United States, it almost certainly is the case that the error with respect to the warrant naming petitioner is part of a larger number of errors in the Dale County Department's files.

deterrence regime will eliminate every instance of the conduct it is designed to deter. Such logic would completely gut the exclusionary rule, for the rule applies by definition only in those cases in which it failed to deter a constitutional violation. From the standpoint of deterrence, there is no more reason to carve out an exception to the exclusionary rule in cases involving individual episodes of negligent recordkeeping than there would be to allow introduction of evidence seized during an individual unconstitutional warrantless arrest if that was simply an "isolated" instance of an officer, or a department, failing to abide by the Fourth Amendment.

Finally, the Government is wrong when it claims that it is impossible, or at least "less necessary and less appropriate," U.S. Br. 21, to deter nonsystematic negligence by means of exclusion. As petitioner has already explained, a police department's record-keeping error rate will be a function of the particular system it has in place – technology, procedures, training, and quality control. Police departments that place a higher priority on avoiding recordkeeping errors are likely to experience fewer of them. To the extent that state and local police departments fail to adopt the best available recordkeeping technology and practices, the unconstitutional searches that occur are in fact avoidable. Like other avoidable derelictions, they are amenable to being deterred by a straightforward application of the exclusionary rule to the category of unconstitutional warrantless searches caused by faulty police recordkeeping practices.

B. Even If Application Of The Exclusionary Rule To Cases Involving Police Recordkeeping Errors Depended On Case-by-Case Analysis, Suppression Would Be Appropriate Here.

1. The Government's first argument for why suppression is unwarranted under the particular facts and circumstances of this case is that "[t]he arresting officers could not, and should not have, been deterred." U.S. Br. 16; *see id.* at 16-19. That argument is true only in a trivial and irrelevant sense.

To be sure, once the negligent police conduct had already taken place – within the recordkeeping unit of the Dale County Sheriff's Department – it was too late to deter Investigator Anderson. But the same is true when an officer in good faith arrests a defendant based on a warrant obtained earlier by a fellow officer who knew or had reason to know the warrant was defective (either because his application affidavit was inadequate or because he knowingly or recklessly provided false information). Although there too the arresting officer "could not" and in some sense "should not" have been deterred, U.S. Br. 16, this Court has nonetheless recognized that suppression is appropriately applied to deter the earlier, unreasonable actions of law enforcement personnel that led to the unconstitutional arrest. This Court's opinion in *Leon* reaffirmed that suppression remains the appropriate remedy when a culpable officer "rel[ies] on colleagues who are ignorant of the circumstances under which the

warrant was obtained to conduct the search." 468 U.S. at 923 n.24 (citing *Whiteley v. Warden*, 401 U.S. 560 (1971)). This would be true even though the actual arresting officers had no reason to know that the originating officer's information was inadequate or inaccurate.[8]

That rule goes hand-in-hand with the complementary Fourth Amendment rule that permits police officers to rely on information they receive from other members of a law enforcement team "engaged in the often competitive enterprise of ferreting out crime," *Johnson v. United States*, 333 U.S. 10, 14 (1948), *see* U.S. Br. 17-19. That reliance is constitutionally acceptable only because the appropriate incentives are in place to ensure that those team members behave appropriately. A critical aspect of that system is the presence of the exclusionary rule.

2. The Government next tries to take this case outside the "general rule in a criminal proceeding" that "evidence obtained as a result of an unlawful, warrantless arrest [is] suppressible if the link between the evidence and the unlawful conduct is not too attenuated," *INS v. Lopez-Mendoza*, 468 U.S.

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[8] As petitioner pointed out in his opening brief, had Investigator Anderson himself been informed that the warrant had been recalled, the fruits of any subsequent search would of course have been suppressed. Pet. Br. 24-25. That surely would remain true even if Investigator Anderson had forgotten about the recall notice, even though once he had forgotten the recall, it would have been impossible to deter him. The Government provides no reason to treat this case differently because a series of police personnel were involved in the events leading up to the unconstitutional search.

1032, 1040-41 (1984), by emphasizing that the negligence here was committed by police employees who were not themselves "officers in the field." U.S. Br. 23. The Government's arguments combine sheer speculation with a profound distortion of deterrence theory.

First, the Government asserts, with no support whatsoever, that clerical employees within police departments somehow distance themselves from their office's "competitive enterprise of ferreting out crime," *Leon*, 468 U.S. at 914, and thus have little incentive to disregard constitutional constraints. The Government provides no reason to hypothesize such a distinction. Common sense suggests the opposite: Long-term employees in police departments, like long-term support personnel in other endeavors, are likely to assimilate the organizational culture and display loyalty to organizational goals. That rationale underlay this Court's observation in *Evans* that judicial clerical personnel were unlikely to perceive themselves as having any "stake in the outcome of particular criminal prosecutions" because they were judicial officers rather than "adjuncts to the law enforcement team." 514 U.S. at 15. Individuals who serve as "adjuncts" to the law enforcement process, as police support personnel clearly do, may often perceive a stake in the outcome of their department's operations that can skew their incentives, absent the deterrence provided by the exclusionary rule. In this case, for example, the Dale County warrants clerk relied on her ready list of warrants, rather than checking the actual warrants file (which would have taken only a few minutes), presumably because she thought speed was of the

essence in responding to a warrants inquiry – exactly the response one would expect from someone who sees herself as a key adjunct to the competitive enterprise of ferreting out crime.

Moreover, the incentives for negligent clerical behavior do not depend only on whether support personnel adopt the perspective of officers in the field. Police warrants clerks may negligently fail to keep records updated not because they affirmatively desire to violate individuals' rights but because other tasks, professional or personal, seem more important than regularly auditing or cross-checking their records.

3. Finally, the Government's speculation that the exclusionary rule would provide no incentive for police departments to alter their practices is undercut by its own brief. In trying to downplay the risk to constitutional rights posed by faulty police records, the Government places great weight on recent reforms undertaken by the FBI with respect to its list of wanted persons. See U.S. Br. 45-50. It is almost certainly the case that the NCIC's procedures, which now involve "numerous checks," *id.* at 48, rolling validation and re-validation, and regular audits, *id.* at 49, are far more detailed than anything done by the Dale County Sheriff's Department, which failed to exercise reasonable caution in maintaining its records.

As the growing adoption of large-scale, widely accessible law enforcement databases exposes even more citizens to the threat of unlawful arrest due to derelictions of recordkeeping duties, it becomes increasingly important that police departments pay

close attention to the accuracy of their recordkeeping systems since the risk of unconstitutional arrests or searches now attaches to a far greater number of police-civilian contacts. This Court does not need an extensive factual record to recognize this common sense conclusion. The Government downplays the risks of large-scale computerized information systems because the Dale County Sheriff's Department had a relatively primitive system. *See* U.S. Br. 43-44. But that observation actually cuts in the opposite direction. Excusing recordkeeping errors based on the level of technology a department chooses, as the Government seems to propose, would paradoxically reward those departments who retain outdated systems. If anything, the fact that the Dale County Department maintains a primitive system shows that minimizing recordkeeping errors is not a high priority for it. Its current system contains no mechanism to ensure the records are accurate and up to date, and provides no reminders that there are outstanding warrants to be executed. There is thus little doubt that the Dale County Department needs stronger, rather than weaker, incentives to maintain accurate records. This Court's longstanding exclusionary rule jurisprudence, which uses the rule to "instill" in police "a greater degree of care toward the rights of an accused" by "refusing to admit evidence gained as a result of [unconstitutional conduct," *Michigan v. Tucker*, 417 U.S. at 447, requires exclusion here.

II. NO REALISTIC SUBSTITUTES FOR EXCLUSION EXIST TO DETER THE KIND OF CONSTITUTIONAL VIOLATION INVOLVED IN THIS CASE.

Having devoted much of its brief to arguing that the exclusionary rule cannot prevent or deter constitutional violations like the one that occurred here, the Government shifts gears to argue that civil liability or internal departmental discipline somehow can. Its argument, however, gets the analysis precisely backwards. Far from being the right kind of case to exempt from "the continued operation of the exclusionary rule, as settled and defined by [this Court's] precedents," *Hudson*, 547 U.S. at 603 (Kennedy, J.), cases like petitioner's are distinctively ill-suited to deterrence through civil liability or internal discipline.

1. The Government's suggestion that civil liability under 42 U.S.C. § 1983, standing alone (that is, absent the possibility of suppression),[9] can provide

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[9] The Government recognizes that state law often provides no civil liability for unconstitutional police conduct. U.S. Br. 32. It goes on to suggest that suppressing evidence might therefore somehow "undermine a State's ability to tailor its remedies for violations of its own law." *Id.* at 33 n.12. But that argument fundamentally misunderstands the point. Unlike *Virginia v. Moore*, 128 S. Ct. 1598 (2008), the case on which the Government relies, this case involves a conceded *Fourth Amendment* violation and not merely a violation of state law. When a state court excludes unconstitutionally obtained evidence – and petitioner has already explained that the majority of state courts to have addressed the issue would have excluded the evidence introduced here, *see* Pet. Br. 39-40 – it vindicates the federal constitutional principle.

an adequate deterrent misunderstands the nature of the constitutional violation and mischaracterizes the law.

The possibility of suing the individual arresting officers in a case such as this is a red herring. The arresting officers, at least in cases where they neither knew nor had reason to know that the department's records were inaccurate, will be entitled to qualified immunity. *See Saucier v. Katz*, 533 U.S. 194 (2001); Pet. Br. 47; Brief of Amicus Curiae American Civil Liberties Union at 8-9. Thus, the Government's citation of cases in which courts permitted lawsuits to go forward against officers who acted in the face of "documentary evidence that the warrant was no longer effective," or who "ignored" problems that "plague[d]" a database, U.S. Br. 29 n. 9 (citing *Peña-Borrero v. Estremeda*, 365 F.3d 7, 13 (1st Cir. 2004); *McMurry v. Sheahan*, 927 F. Supp. 1082, 1088 (N.D. Ill. 1996)), is beside the point. To be sure, individual liability is appropriate in such cases: those officers not only violated the Fourth Amendment but they did so with a constitutionally culpable mindset, and qualified immunity does not protect "those who knowingly violate the law." *Malley v. Briggs,* 475 U.S. 335, 341 (1986). But it is equally clear that in cases of knowing or reckless conduct by individual arresting officers, as the Government itself concedes, suppression is required as well. Civil liability is a supplement to, not a substitute for, suppression.

Substituting individual damages actions for suppression in cases of recordkeeping negligence would not only contravene this Court's precedent, but it would generate perverse incentives. If

arresting officers faced personal liability any time they relied, however much in subjective good faith, on inaccurate information, this would dissuade officers from executing any warrant without conducting an independent investigation into its continued existence. This would be inefficient and would overdeter police activity in the vast majority of cases in which the information was in fact accurate. Suppression is a more finely calibrated remedy.

If there are appropriate individual defendants in negligent recordkeeping cases, they would thus have to be the negligent back-office police personnel who failed to exercise appropriate care to maintain accurate records. But the difficulties with finding and suing such defendants make individual damages actions an implausible mechanism for deterring culpable negligence. First, as petitioner and his amici have already explained, it may be impossible even to identify the responsible defendant. See Pet. Br. 46. The Government does not so much as hint at how a potential section 1983 plaintiff could go about determining whom to sue. These difficulties would be exacerbated absent the exclusionary rule, since suppression hearings would then provide no opportunity to probe internal department practices once the arresting officers' bona fides were established.

Moreover, given the quite plausible possibility that one individual failed to make the appropriate initial notation but that a number of other individuals, over the ensuing months, failed to catch the error by failing to conduct audits or cross-checks, which, if any, of these employees is an appropriate defendant? This raises an additional problem: as a

doctrinal matter, can an individual who acted negligently in failing to accurately update a record be held liable at all for an arrest that is the product of a series of intervening actions by other government officials? That is, but for the independent actions of Investigator Anderson and Deputy Bradley, the actions of the unidentified, and perhaps unidentifiable, employee or employees in the Dale County Sheriff's Department would never have led to a violation of petitioner's constitutional rights.

In response to these practical problems, the Government makes the bizarre suggestion that this Court has "determined, however, that 'the *threat* of litigation and liability will adequately deter [individual government officials from committing constitutional violations] no matter that they may enjoy qualified immunity.'" U.S. Br. 29 (quoting *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 70 (2001)) (interpolation in the original; emphasis added). Contrary to the Government's citation, *Malesko* never made any such suggestion. The Government's argument wrenches the quotation completely out of context. In fact, *Malesko* was not a case about individual officer liability at all; rather, it presented the entirely different question whether this Court should create a distinct cause of action against private corporations acting under color of federal law to supplement the individual damages remedy provided under *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971). It was in that very different context that the Court explained that individual damages actions provide sufficient deterrence even though there will be some cases in which individual defendants "may enjoy qualified

immunity." The Court was not making the nonsensical claim that the threat of litigation will deter a class of constitutional violations as to which immunity is invariably available, as would be the case with respect to suits seeking individual liability against police personnel who were not themselves negligent.

Indeed, beyond citing *Malesko* completely out of context, the Government offers no explanation whatsoever of why the prospect of fruitless litigation would have any deterrent effect, and common sense suggests exactly the opposite.[10] Indeed, there cannot be any realistic threat of litigation in the first place given the absolutely foreseeable lack of success on the merits and thus any prospect of attorneys' fees.

2. Nor would lawsuits against the police department whose inaccurate records led to an unconstitutional arrest, *see* U.S. Br. 30, provide appropriate deterrence. In light of this Court's decisions in *Monell v. New York City Dep't of Social Services*, 436 U.S. 658 (1978), and its progeny, the availability of governmental liability, far from undercutting the justification for the exclusionary rule, actually reinforces it.

Liability under *Monell* attaches only when the constitutional violation occurred pursuant to an official "policy." But these are precisely the kinds of

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[10] For example, in *Bush v. Lucas*, 462 U.S. 367 (1983), this Court held, as a categorical matter, that *Bivens* suits cannot be brought by "federal employees whose First Amendment rights are violated by their superiors." *Id.* at 368. It would be absurd to suggest that the "threat of litigation" would nonetheless somehow deter such violations.

cases in which suppression, as well as damages, will be available even under the Government's approach.

The standard *Monell* case involves a jurisdiction that formally authorizes or tacitly condones constitutional violations. In *Monell* itself, for example, New York City maintained an express policy requiring pregnant employees to take unpaid leaves that created an unconstitutional irrebuttable presumption. In *Webster v. City of Houston*, 739 F.2d 993 (5th Cir. 1984) (en banc), for example, the policy consisted of the Houston Police Department's custom of planting "throw down" guns at the sites of police shootings to make it appear that individuals shot by officers had been armed.

With respect to these sorts of cases, in which a constitutional violation is the product of an official decision to violate or condone the violation of constitutional rights, municipal liability is clearly appropriate. But the Government concedes, as it must, that these are also the paradigmatic cases in which suppression is required as well. *See* U.S. Br. 18 n.5. Indeed, it seems hard to imagine a more appropriate case for suppression than one in which a police department's official policy is to violate the Fourth Amendment. Surely, if a police department had an affirmative practice of keeping warrants in its database even after those warrants have been recalled, suppression would be demanded. Thus, as a matter of logic, the availability of damages does nothing to undercut the rationale for the continued application of the exclusionary rule.

Perhaps recognizing that treating petitioner's case as providing for that sort of *Monell* liability

would damn its efforts to avoid suppression as well, the Government turns to a different category of municipal liability: the so-called failure to train claims that were recognized by this Court in *City of Canton v. Harris*, 489 U.S. 378 (1989). U.S. Br. 30. In *Board of County Comm'rs v. Brown*, 520 U.S. 397 (1997), this Court explained that under "limited circumstances," *Monell* liability might attach to "a deficient training 'program'" that "failed to prevent [constitutionally] tortuous conduct by employees." *Id.* at 407 (citing and quoting from *City of Canton*). The Government never explains, however, how this case can be forced into the failure-to-train pigeonhole. The culpable official omission here was not a failure to train, but a failure to take due care to ensure the accuracy of the ready-reference warrants list. Again, the Government's argument is circular. If *Monell* liability were available for such a claim, then suppression would clearly be required as well, since establishing the requisite proof of entity level "fault and causation," *Brown*, 520 U.S. at 405, shows that the department has struck the wrong balance with respect to protecting constitutional rights. But because the Government steadfastly denies that cases like petitioner's involve entity-level decisions, *Monell* liability cannot substitute for suppression. Here, too, exclusion and *Monell* liability rise and fall together.[11]

3. Nor will internal department disciplinary processes, standing alone, provide an adequate

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[11] Thus, the Government's citation of cases where there were documented repeat errors, *see* U.S. Br. 31 n. 10, provides no support for its argument

deterrent in the absence of the exclusionary rule. The Government's argument here suffers from the same fundamental problem as its other arguments about alternatives: it never identifies any characteristic of negligent recordkeeping cases that separates them from all the other forms of constitutionally culpable conduct to which suppression concededly applies. Put simply, if internal disciplinary processes cannot substitute for exclusion in cases of deliberate wrongdoing by arresting officers – and they cannot – what reason is there to suppose that internal discipline is somehow an adequate substitute in cases of negligent performance by back office personnel?

Indeed, in the absence of the exclusionary rule, derelictions of recordkeeping duties are distinctively unlikely to prompt the kind of internal discipline necessary to prevent further constitutional violations. The kind of employee misconduct most likely to trigger internal discipline is misconduct that imposes some substantial costs on a police department. Those costs might involve direct expenditures – for example, damages awards in section 1983 cases. But petitioner has already explained that neither individual nor *Monell* liability is likely in cases such as this.

Or the costs might be operational – undermining a department's efficiency. This case shows why those costs are tightly tied to the presence of the exclusionary rule. Keeping a bloated, outdated warrants list by itself imposes no costs on a department. As this case shows, officers are under no obligation to execute every outdated invalid warrant still sitting around in a department's

database. If anything, bloated lists offer departments an illegitimate benefit: increasing the possibility that officers will have a justification for stopping and searching individuals as to whom they have hunches that rise neither to the level of probable cause nor even to the level of reasonable suspicion necessary for a *Terry* stop.

It is the exclusionary rule that communicates, in a form that police departments will understand and to which they will respond, that there is no benefit to maintaining inaccurate records: nothing the police obtain by relying on those records will be admissible. Any time police officers expend on cases resting on inaccurate information will be wasted. But if the exclusionary rule is relaxed, that message is lost. Since internal discipline itself involves costs, the Government provides no reason to suppose that once suppression no longer follows from recordkeeping negligence that leads to unconstitutional arrests and searches, police departments will spend their resources on seeking to identify and discipline employees who fail to maintain up-to-date lists.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

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